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RESTRICTIONS ON THE USE OF PATENTED ARTICLES.

THE case of *Henry v. Dick*¹ recently decided by the Supreme Court of the United States, has occasioned considerable unfavorable comment in the public press. It seems to be the opinion of many that the decision lays down a new principle of law, particularly adaptable to the working of a monopoly, and that the public is, under the supposed new principle, exposed to a practically unlimited exploitation by any patentee. It is believed that neither of these contentions is correct.

The question in this case was certified to the Supreme Court by the Circuit Court of Appeals of the Second Circuit, the decision below being reported in 149 Fed. 424. The complainant's patents, granted December 15, 1903, and January 19, 1904, respectively, covered a device known as the "Rotary Mimeograph," which is a machine for producing, by means of wax stencils, numerous copies of typewritten or other written matter. These machines were not sold unconditionally, but under the following

"LICENSE RESTRICTION.

This machine is sold by the A. B. Dick Co. with the license restriction that it may be used only with the stencil-paper, ink and other supplies—

Made by

A. B. DICK COMPANY,
Chicago, U. S. A."

Complainant sold one of these machines with this license restriction to Miss Skou. The acts of the defendant, as expressed in the certificate, were as follows:

"The defendant Sidney Henry sold to Miss Skou a can of ink suitable for use upon said Mimeograph with knowledge of the said license agreement and with the expectation that it would be used in connection with said Mimeograph."

The question certified was: "*Did the acts of the defendants constitute contributory infringement of the complainant's patents?*"

The Supreme Court answered the question in the affirmative, Justice LURTON delivering the opinion of the Court. Concurring with him were Justices McKENNA, HOLMES, and VAN DEVANTER. Dissenting, the Chief Justice, Justice HUGHES and Justice LAMAR. Justice DAY was absent and took no part in the decision, Justice

¹ *Sidney Henry et al. v. A. B. Dick Co.* (1912) 32 Sup. Ct. 364.

HARLAN died before the case was decided and his successor had not then been appointed.

It is difficult to see how the Court, as it was constituted when this case was decided, could have decided otherwise in view of the judicial history of its various members.

Mr. Justice LURTON, who wrote the prevailing opinion, wrote the opinion in *Park v. Hartman*,² and *Heaton Peninsular Button Fastener Co. v. Eureka Specialty Co.*³ Mr. Justice MCKENNA wrote the opinion in *Continental Paper Bag Co. v. Eastern Paper Bag Co.*⁴ Mr. Justice VAN DEVANTER wrote the opinion in *National Phonograph Co. v. Schlegel*.⁵ Mr. Justice HOLMES, while Chief Justice of the Supreme Court of Massachusetts, decided *Garst v. Harris*,⁶ and later dissented in *Dr. Miles Medical Co. v. Park*.⁷ In all of these cases the same or some other right analagous to that contended for by the A. B. Dick Company was sustained.

The Constitution of the United States, Article I, Section 8, provides:

"Congress shall have power * * * to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

This is the constitutional basis for our patent legislation.

§ 4886, of the REVISED STATUTES, provides that:

"Any person who has invented or discovered any new and useful art, machine, manufacture or composition of matter, or any new and useful improvements thereof * * * may, upon payment of the fees required by law, and other due proceeding had, obtain a patent therefor."

REVISED STATUTES, § 4884, provides:

"Every patent shall contain * * * a grant to the patentee, his heirs or assigns, for the term of seventeen years, of the exclusive right to make, use, and vend the invention or discovery throughout the United States, and the Territories thereof * * * ."

The Patent Statutes do not give to the patentee the right to make, use and vend. He has these rights independently of them. The only right which is given by the patent laws is the right to exclude

² 153 Fed. 24.

³ 77 Fed. 288.

⁴ 210 U. S. 405.

⁵ 128 Fed. 733.

⁶ 177 Mass. 72, 58 N. E. 174.

⁷ 220 U. S. 373.

others from the practice of the invention or discovery. In the language of Chief Justice TANEY:

"The franchise which the patent grants consists altogether in the right to exclude every one from making, using or vending the thing patented without the permission of the patentee. This is all that he obtains by the patent."⁸

In *Continental Paper Bag Co. v. Eastern Paper Bag Co.*,⁹ Mr. Justice McKENNA, in speaking of the earlier cases, stated:

"Whenever this Court has had occasion to speak, it has decided that an inventor receives from a patent the right to exclude others from its use for the time prescribed in the statute."

In *Re Brosnahan, Jr.*,¹⁰ Mr. Justice MILLER said:

"It is to be observed that no constitutional or statutory provision of the United States was, or ever has been, necessary to the right of any person to make an invention, discovery, or machine, or to use it when made, or to sell it to some one else. Such right has always existed, and would exist now if all patent laws were repealed. It is a right which may be called a natural right, and which, so far as it may be regulated by law, belongs to ordinary municipal legislation; and it is unaffected by anything in the constitution or patent laws of the United States.

"The sole object and purpose of the laws which constitute the patent and copyright system is to give to the author and the inventor a monopoly of what he has written or discovered, that no one else shall make or use or sell his writings or his invention without his permission; and what is granted to him is the exclusive right; not the abstract right, but the right in him to the exclusion of *everybody else* * * * ."

In *Victor Co. v. The Fair*,¹¹ Judge BAKER said:

"Without applying to the patent office, one may make and use and sell the device that embodies his invention. That is his natural right. All that the government can and does grant him is the right to exclude others from practicing his invention without his consent."

To the same effect are *Grant v. Raymond*,¹² and *Consolidated Milling Co. v. Coombs*.¹³

⁸ *Bloomer v. McQuewan*, 14 How. 539.

⁹ 210 U. S. 405, 425.

¹⁰ 18 Fed. 62.

¹¹ 123 Fed. 424, 426.

¹² 6 Pet. 218.

¹³ 39 Fed. 804.

The grant of a patent, by its terms, covers three separate and separable fields and grants to the patentee: (a) the right to exclude all others from making, (b) the right to exclude all others from using and (c) the right to exclude all others from vending, the invention.¹⁴ No one has any right without the consent of the patentee, either to make, to use or to vend the patented invention. A licensee has no interest in the patent. A license gives to the licensee immunity from suit by the patentee with respect to the particular acts licensed. If he invades any portion of the field reserved by the patentee, he is an infringer, just as a tenant who occupies premises not included in his lease is a trespasser.

The patentee having the right to exclude every one from the fields of making, using and vending, any one who without license from him either makes, uses or vends, violates the exclusive right granted to the patentee and therefore any unlicensed or extra-licensed making, using or vending infringes his patent. It has never been doubted that within the field of making, the patentee has a complete monopoly and that any unlicensed or extra-licensed manufacture of the patented invention is an infringement.¹⁵

The same is true of unlicensed or extra-licensed sale.

It is not easy to see how there can be any difference with respect to unlicensed or extra-licensed use. As was said by Justice LURTON (then Circuit Judge) in *Park v. Hartman*:¹⁶

"The patent grants an exclusive right to use, to make and to sell. The patentee may grant, if he will, an unrestricted right to make and sell or use the device embodying his invention, or may grant only a restricted right in either the field of making, using or selling. To the extent that he restricts either one of these separable rights the article is not released from the domain of the patent, and any one who violates the restrictions imposed by the patentee, with notice, is an infringer."

In conformity with this principle it has been held that the patentee has the right by license to restrict the use or sale of his patented

¹⁴ *Victor Co. v. The Fair*, 123 Fed. 424, 426.

¹⁵ *Goodyear v. Congress Rubber Co.*, 3 Blatch. 449; F. C. Vol. 10, 5565; *Victor Co. v. The Fair*, 123 Fed. 424.

¹⁶ 153 Fed. 24, 27. The following cases announce the same rule: *National Phonograph Co. v. Schlegel*, 128 Fed. 733; *Thompson-Houston Electric Co. v. Kelsey Railway Specialty Co.*, 72 Fed. 1016, 75 Fed. 1005; *Heaton Peninsular Button Fastener Co. v. Eureka Specialty Co.* 77 Fed. 288; *Tubular Rivet & Stub Co. v. O'Brien*, 93 Fed. 200; *Loew Filter Co. v. German-American Co.*, 107 Fed. 949, 950; *Cortelyou v. Lowe*, 111 Fed. 1005; *Goodyear Shoe Machinery Co. v. Jackson*, 112 Fed. 446; *Brodrick Copygraph Co. v. Roper*, 124 Fed. 1019; *Brodrick v. Mayhew*, 131 Fed. 92; *A. B. Dick Co. v. Roper*, 126 Fed. 966; *Rupp-Wittgenfeld Co. v. Elliott*, 131 Fed. 730, 732; *Cortelyou v. Johnson*, 138 Fed. 110.

invention. These limitations may roughly be grouped under the following heads: (a) Price limitations;¹⁷ (b) Personal limitations;¹⁸ (c) Limitation of use, except with specified non-patented accessories;¹⁹ (d) Other limitations.²⁰

It will be observed, under subdivision (c), above, that the doctrine announced by the Supreme Court, that it is lawful to impose as a license condition that the patented device shall be used only with specified non-patented accessories purchased of the patentee, has been sustained in many cases and might reasonably have been regarded as settled doctrine. It is difficult to see how any other conclusion could be arrived at. The patentee has the *exclusive* right to make, use, and sell his invention. These three fields are separate and separable. He is under no obligation to exercise the invention himself, or permit others to do so.²¹ Having the greater right he has the less, that is, if he choose to permit outsiders, either to make, use or sell the patented device, he may do so on whatever terms he may prescribe, and thus he may license a use on condition that it be only with non-patented supplies purchased from him.

The patentee has the whole right, the absolute monopoly in the patented invention. He may exclude others from its exercise wholly or in part, reserving to himself every portion of his monopoly not expressly parted with. In *Henry v. Dick*, he reserved to himself

¹⁷ *Central Co. v. Cushman*, 143 Mass. 353; 9 N. E. 629; *Bement v. National Harrow Co.*, 186 U. S. 70; *Victor Co. v. The Fair*, 123 Fed. 424; *The Fair v. Dover Mfg. Co.*, 166 Fed. 117; *New Jersey Patent Co. v. Schaeffer*, 159 Fed. 171, 178 Fed. 276; *New Jersey Patent Co. v. Weinberg*, 183 Fed. 588; *Edison Co. v. Smith Mercantile Co.*, 188 Fed. 925; *Rubber Tire Wheel Co. v. Milwaukee Rubber Co.*, 154 Fed. 358; *U. S. Consolidated Seeded Raisin Co. v. Griffin & Skelley*, 126 Fed. 364; *Indiana Mfg. Co. v. Case Threshing Machine Co.*, 154 Fed. 365; *Authors of Newspaper Assn. v. O'Gorman*, 147 Fed. 616; *Edison Co. v. Pike*, 116 Fed. 863; *Murphy v. Christian Press Assn.*, 56 N. Y. S. 597; *Straus v. Publishers' Assn.*, 193 N. Y. 496, 86 N. E. 525; *Automatic Pencil Sharpener Co. v. Goldsmith Bros.*, 190 Fed. 205; *Waltham Watch Co. v. Keene*, 191 Fed. 855; *Goshen Rubber Works v. Single Tube Co.*, 166 Fed. 431.

¹⁸ *National Phonograph Co. v. Schlegel*, 128 Fed. 733; *Board of Trade v. Christie Co.*, 198 U. S. 236; *Hunt v. N. Y. Cotton Exchange*, 205 U. S. 322.

¹⁹ *Heaton Peninsular Button Co. v. Eureka Specialty Co.*, 77 Fed. 288; *Crown Cork Co. v. Brooklyn Bottle Stopper Co.*, 172 Fed. 225; *Commercial Acetylene Co. v. Autolux Co.*, 181 Fed. 387; *Dick v. Henry*, 149 Fed. 424; *Dick Co. v. Milwaukee Office Specialty Co.*, 168 Fed. 930; *Aeolian Co. v. Juelg Co.*, 155 Fed. 119; *Tubular Rivet Co. v. O'Brien*, 93 Fed. 200; *Rupp & Wittgenfeld Co. v. Elliott*, 131 Fed. 730; *Crown Cork & Seal Co. v. Standard Brewery*, 174 Fed. 252; *Cortelyou v. Lowe*, 111 Fed. 1005; *Cortelyou v. Johnson*, 145 Fed. 933; *Cortelyou v. Carter's Ink Co.*, 118 Fed. 1022; *Brodrick Copy-graph Co. v. Mayhew*, 131 Fed. 92, 137 Fed. 596; *Victor Co. v. Leeds & Catlin*, 150 Fed. 147; *Commercial Acetylene Co. v. Autolux Co.*, 181 Fed. 387; *Crown Cork & Seal Co. v. Standard Brewery Co.*, 174 Fed. 252.

²⁰ *Gloucester Isinglass & Glue Co. v. Russia Cement Co.*, 154 Mass. 92, 27 N. E. 1005.

²¹ *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U. S. 405.

the whole right to make and the whole right to vend and parted only with a very small portion of his right to use, retaining in himself that right with any supplies, except those of his (the patentee's) own production. That is to say that no one but the patentee could use the device with supplies purchased from others. He had not parted with that portion of his monopoly. Obviously for any one else to do so would be to trespass upon the field which the patentee had reserved to himself; in other words, to infringe his patent. Persons who with knowledge actively assist and contribute to another's infringement are themselves liable as infringers. The defendants in these cases base their defense on the well settled rule of law that the unconditional sale of a patented article releases it from the patent monopoly and is an implied license to use and resell; but they apparently lose sight of the equally well settled rule that where the sale of a patented article is not unconditional, the vendee or licensee must comply with the condition or he becomes an infringer.²²

The case of *Henry v. Dick* came before the Supreme Court on a question certified to it by the Circuit Court of Appeals of the Second Circuit. It would seem as if that very Court had already answered the question in the affirmative in *Cortelyou v. Lowe*,²³ and the question was also answered in the affirmative, by the Circuit Court for the Southern District of New York;²⁴ by the Circuit Court for the District of Rhode Island;²⁵ by the Circuit Court for the Eastern District of Wisconsin;²⁶ and by other Circuit Courts whose decisions have not been reported. Also by the Circuit Court of appeals for the Second Circuit;²⁷ and by the Circuit Court of Appeals for the Seventh Circuit.²⁸ In these cases, the question put by the certificate has been answered in the affirmative by Circuit Judges WALLACE,²⁹ LACOMBE,³⁰ TOWNSEND,³¹ SEAMAN,³² BAKER,³³

²² *Rubber Co. v. Goodyear*, 9 Wall. 788; *Mitchell v. Hawley*, 16 Wall. 544; *Birdsell v. Shaliol*, 112 U. S. 485.

²³ 111 Fed. 1005.

²⁴ *Cortelyou v. Lowe*, decision unreported but see affirming decision of C. C. A., 111 Fed. 1005, also *Cortelyou v. Carter*, 118 Fed. 1022; *Cortelyou v. Johnson*, 138 Fed. 110; *Dick v. Henry*, 149 Fed. 424.

²⁵ *Brodrick Co. v. Roper*, 124 Fed. 1019.

²⁶ *Brodrick Co. v. Mayhew*, 131 Fed. 92, and *Dick Co. v. Milwaukee Co.*, 168 Fed. 930.

²⁷ *Cortelyou v. Lowe*, 111 Fed. 1005.

²⁸ *Mayhew v. Brodrick Co.*, 137 Fed. 596.

²⁹ 111 Fed. 1005.

³⁰ 111 Fed. 1005.

³¹ 145 Fed. 937.

³² 131 Fed. 596.

³³ 137 Fed. 596.

JENKINS,³⁴ and by District Judges RAY,³⁵ THOMAS,³⁶ WHEELER,³⁷ and BROWN.³⁸

In cases other than those concerning the Mimeograph and Neo-style patents but presenting a similar state of facts (practically the only difference in certain of the cases being as to the character of the limitation imposed by the license), the question propounded to the Court in *Henry v. Dick* was answered in the affirmative, by the Circuit Court for the District of Massachusetts;³⁹ by the Circuit Court for the Western District of Pennsylvania;⁴⁰ by the Circuit Court for the District of Massachusetts;⁴¹ by the Circuit Court for the Southern District of Ohio;⁴² by the Circuit Court for the Eastern District of Pennsylvania;⁴³ by the Circuit Court for the Southern District of New York;⁴⁴ by the Circuit Court for the Eastern District of New York;⁴⁵ by the Circuit Court for the Northern District of Illinois;⁴⁶ by the Circuit Court for the Eastern District of Wisconsin.⁴⁷ Also by the Circuit Court of Appeals for the Second Circuit;⁴⁸ by the Circuit Court of Appeals for the Third Circuit;⁴⁹ by the Circuit Court of Appeals for the Sixth Circuit;⁵⁰ by the Circuit Court of Appeals for the Seventh Circuit;⁵¹ by the Circuit Court of Appeals for the Eighth Circuit.⁵²

In the cases the question was answered in the affirmative by (then) Circuit Judges LURTON,⁵³ TAFT,⁵⁴ VAN DEVANTER,⁵⁵ Circuit Judges WALLACE,⁵⁶ LACOMBE,⁵⁷ COXE,⁵⁸ ACHESON,⁵⁹ SANBORN,⁶⁰

³⁴ 137 Fed. 596.

³⁵ 138 Fed. 110, and 149 Fed. 424.

³⁶ Lowe Case at Circuit, unreported.

³⁷ 114 Fed. 1021.

³⁸ 124 Fed. 1019.

³⁹ Tubular Rivet Co. v. O'Brien, 93 Fed. 200.

⁴⁰ Edison v. Kaufmann, 105 Fed. 960.

⁴¹ Edison v. Pike, 116 Fed. 863.

⁴² Rupp v. Elliott, decision unreported but affirmed at 131 Fed. 730.

⁴³ New Jersey Co. v. Schaefer, 144 Fed. 437; same v. same, 159 Fed. 171, and same v. Weinburg, 183 Fed. 588.

⁴⁴ Aeolian Co. v. Juelg Co., 145 Fed. 939.

⁴⁵ Crown, etc. Co. v. Brooklyn, etc. Co., 173 Fed. 225.

⁴⁶ Crown, et. Co. v. Standard Brewery, 174 Fed. 252.

⁴⁷ Commercial Co. v. Autolux Co., 181 Fed. 387.

⁴⁸ Aeolian Co. v. Juelg Co., 155 Fed. 119.

⁴⁹ New Jersey Co. v. Schaefer, 178 Fed. 276.

⁵⁰ Button-Fastener Case, 77 Fed. 288, and Rupp v. Elliott, 131 Fed. 730.

⁵¹ Victor Co. v. Fair, 123 Fed. 424, and Fair v. Dover Co., 166 Fed. 117.

⁵² Phonograph Co. v. Schlegel, 128 Fed. 733.

⁵³ 77 Fed. 288.

⁵⁴ 77 Fed. 288.

⁵⁵ 128 Fed. 734.

⁵⁶ 155 Fed. 119.

⁵⁷ 155 Fed. 119.

⁵⁸ 155 Fed. 119.

⁵⁹ 105 Fed. 960.

GROSSCUP,⁶¹ BAKER,⁶² JENKINS,⁶³ KOHLSAAT,⁶⁴ SEAMAN,⁶⁵ THAYER,⁶⁶ LANNING,⁶⁷ BUFFINGTON,⁶⁸ GRAY,⁶⁹ District Judges HAMMOND,⁷⁰ LOWELL,⁷¹ THOMPSON,⁷² CHATFIELD,⁷³ HOLLAND,⁷⁴ MCPHERSON,⁷⁵ QUARLES.⁷⁶

The condition involved in an affirmative answer to the question has been unfavorably criticised only in the following special cases and to the following extent.

The Circuit Court for the Southern District of Iowa⁷⁷ held a price-maintenance license agreement under Letters Patent invalid. This was reversed by the Circuit Court of Appeals for the Eighth Circuit.⁷⁸ The Circuit Court for the Eastern District of Wisconsin⁷⁹ in effect held a price-maintenance license agreement under Letters Patent violative of the so-called "Anti-Trust Act." This was reversed by the Circuit Court of Appeals for the Seventh Circuit.⁸⁰ The Circuit Court for the Western District of Michigan⁸¹ held that condition unlawful as against public policy but was reversed by the Circuit Court of Appeals for the Sixth Circuit.⁸²

Two members of the Circuit Court of Appeals for the Second Circuit (against the dissent of the third), guardedly and with expressed qualification⁸³ answered the question in the negative. This was after the same Court, differently constituted had answered the same question in the affirmative.⁸⁴

To summarize, the proposition of law involved in an affirmative answer to the question had been maintained by nine Circuit Courts

⁶⁰ 174 Fed. 252 and 128 Fed. 734.

⁶¹ 123 Fed. 424, 154 Fed. 358, and 365; 166 Fed. 117.

⁶² 123 Fed. 424; 154 Fed. 358 and 365; 166 Fed. 117.

⁶³ 123 Fed. 424.

⁶⁴ 154 Fed. 358 and 154 Fed. 365.

⁶⁵ 166 Fed. 117.

⁶⁶ 128 Fed. 734.

⁶⁷ 178 Fed. 276.

⁶⁸ 178 Fed. 276.

⁶⁹ 178 Fed. 276.

⁷⁰ 77 Fed. 288.

⁷¹ 116 Fed. 863.

⁷² Affirming decision 131 Fed. 730.

⁷³ 172 Fed. 225.

⁷⁴ 159 Fed. 171, and 183 Fed. 588.

⁷⁵ 144 Fed. 437.

⁷⁶ 181 Fed. 387.

⁷⁷ 117 Fed. 624.

⁷⁸ *Phonograph Co. v. Schlegel*, 128 Fed. 733.

⁷⁹ 142 Fed. 531 and 148 Fed. 21.

⁸⁰ *Rubber Tire Case*, 154 Fed. 358 and *Indiana Co. v. Case Co.*, 154 Fed. 365.

⁸¹ 65 Fed. 619.

⁸² *Button-Fastener Case*, 77 Fed. 288.

⁸³ *Cortelyou v. Johnson*, 145 Fed. 933.

⁸⁴ *Cortelyou v. Lowe*, 111 Fed. 1005.

and by Circuit Courts of Appeals, the decisions having been rendered by twenty-nine different judges. Opposed thereto are only two (reversed) decisions of the Circuit Courts and the majority decision of a divided Circuit Court of Appeals, these having been rendered by four different judges.

The English Courts have uniformly held that restrictions of a similar character are valid and that violation is infringement.

National Phonograph Co. of Australia v. Menck,⁸⁵ was an appeal from the High Court of Australia to the English Privy Council. Appellants owned three Australian patents for improvements in phonographs, improvements in the production of sound records or blanks, and improvements in sound records or blanks. It appeared that in the course of their business the appellants sold Edison phonographs, records and blanks, made in accordance with and under the protection of the letters patent. These were sold to jobbers under jobbers' contracts. Jobbers had power to sell to dealers, but the dealers' contracts were made direct with the appellants. Menck, the respondent, was a dealer and had various dealers' agreements, and the appellants entered him in their dealers' list. The ninth section of the dealers' contract provided that:

"Dealers violating any of the foregoing conditions of sale or any other reasonable conditions that may from time to time be imposed * * * may be at once withdrawn from the dealers' list."

On the dealers' part he undertook that "in the event of my name being removed from the dealers' list, I will in no way handle, sell, or deal in or use, either directly or indirectly, Edison phonographs and parts thereof, Edison records and Edison blanks, unless authorized to do so in writing." In referring to the situation, Lord SHAW said:

"There are * * * two questions which are raised in the case. The first has reference to the allegation by the appellants that the respondent has acted in breach of this contract. The second—much more important in principle—is that he has acted in breach of their rights as patentees."

The first aspect of the case is then discussed at considerable length. After weighing the arguments pro and con and discussing the authorities, Lord SHAW said:

"In their Lordships' opinion, it is thus demonstrated by a clear course of authority, first, that it is open to a licensee, by virtue of his statutory monopoly, to make a sale *sub modo*, or accompanied by restrictive conditions which would not

⁸⁵ 104 L. T. (N. S.) 5.

apply in the case of ordinary chattels; secondly, that the imposition of these conditions in the case of a sale is not presumed, but, on the contrary, a sale having occurred, the presumption is that the full right of ownership was meant to be vested in the purchaser; while thirdly, the owner's rights in a patented chattel will be limited if there is brought home to him the knowledge of conditions imposed, by the patentee or those representing the patentee, upon him at the time of sale. It will be observed that these propositions do not support the principles relied upon in their absolute sense by any of the judges of the court below. On the one hand, the patented goods are not, simply because of their nature as chattels, sold free from restriction. Whether that restriction affects the purchaser is in most cases assumed in the negative from the fact of sale, but depends upon whether it entered into the conditions upon which the owner acquired the goods. On the other hand, restrictive conditions do not in the extreme sense put, run with the goods, because the goods are patented. Applying these principles to the present case, the result is this: the respondent, Mr. Menck, has been acquitted of every charge of violation of contract which was laid against him by the appellants. He has also succeeded in showing that the claim made by the appellants as patentees was in its nature extreme and unsound in law. But he made this mistake: he assumed that, being guiltless of a violation of the contract, he was as free as an ordinary member of the public who had acquired possession of articles embodying the appellants' patent. His misfortune, however, consists in this, that by the very fact that he entered into contractual relations with the appellants, he has become seized with the knowledge of the conditions on which they dispose of their goods, and he is not free to put forward the plea that such conditions have not been brought home to him. When he therefore announced his intention of dealing in these articles as ordinary articles of commerce, he must be held to have pursued a mistaken course, the course of treating himself as an unrestricted instead of a restricted trader. In this particular case the result may involve some hardship to him, but their Lordships cannot see their way to a departure from the principle that a restriction rests upon a purchaser of goods which are covered by a grant of a patent, and have come into the possession of a purchaser in the full knowledge of the restrictions imposed by the patentee upon their disposal."

This is in accord with the current of English authority, which had its origin in the year 1871, in the case of *Betts v. Wilmott*.⁸⁶ This was followed in 1883 by *Societe Anonyme des Manufactures de Glaces v. Tilghman's Patent Sand Blast Company*,⁸⁷ in 1888 by *Heap v. Hartley*,⁸⁸ in 1895 by *The Incandescent Gas Light Company, Ltd. v. Cantelo*,⁸⁹ in 1899 by *The Incandescent Gas Light Company, Ltd. v. Brogden*,⁹⁰ in 1901 by *British Mutoscope and Biograph Co., Limited v. Homer*,⁹¹ in 1904 by *McGruther v. Pitcher*,⁹² and in 1906 by *Badische Anilin and Soda Fabrik v. Isler*.⁹³

The dire results following from this decision, pictured by the Chief Justice in his dissenting opinion, seem to be overdrawn. There is involved no question of the interest of the public. The patentee has by statute an absolute monopoly. This, however, extends only for a limited time and is a reward guaranteed by the Constitution to the patentee for the giving to the world of useful inventions, and is the result of an enlightened public policy. The interest of the public is not apparent, because the public gets the full right to practice the invention at the expiration of the limited statutory term, and in the short interval of monopoly it is deprived of nothing which it had before, because the patented article, in order to be patented, must be new and original. Therefore, during the term of the patent it is the right and interest of the patentee that is to be protected. The public gets its right and interest at the end of the term. Whatever the public gets during the term is a matter of generosity and grace and not a matter of right.

In conclusion, the case of *Henry v. Dick* does not, in the opinion of the writer, depart from accepted doctrine, but, on the contrary, is a reaffirmance by the Supreme Court of a rule of law and of policy long established and widely acted upon.

EDWARD S. ROGERS.

CHICAGO.

⁸⁶ 25 L. T. (N. S.) 188, L. R. 6 Ch. 239.

⁸⁷ 49 L. T. (N. S.) 451; L. R. 25 Ch. D. 1.

⁸⁸ 5 R. P. C. 603.

⁸⁹ 12 R. P. C. 262.

⁹⁰ 16 R. P. C. 179.

⁹¹ 18 R. P. C. 177; 84 L. T. (N. S.) 26; [1901] 1 Ch. 671.

⁹² 2 Ch. 306, 91 L. T. (N. S.) 678.

⁹³ 1 Ch. 611, 23 R. P. C. 173.